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**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of

Implementation of the Telecommunications Act of 1996:

Telemessaging, Electronic Publishing, and Alarm Monitoring Services

CC Docket No. 96-152

ORDER ON RECONSIDERATION AND THIRD REPORT AND ORDER

Adopted: September 8, 1999

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By the Commission:

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I. INTRODUCTION

1. On February 8, 1996 the "Telecommunications Act of 1996" (1996 Act) became law.¹ On February 7, 1997 the Commission released the *Telemessaging and Electronic Publishing Order*, which implemented the telemessaging and electronic publishing provisions of the 1996 Act, sections 260 and 274, respectively.² On March 24, 1997 AT&T Corp. (AT&T) and the Pacific Telesis Group (Pacific) filed separate petitions to reconsider various aspects of the *Telemessaging and Electronic Publishing Order*.³ On the same day the Commission released the *Telemessaging and Electronic Publishing Order*, the Commission issued a *Further Notice* that sought comment on the meaning of "control," "financial interest" and "transaction" in section 274. For the reasons set forth below, we grant AT&T's petition in part and deny in part, and grant Pacific's petition. We also decline to adopt rules in response to the *Further Notice*.

II. BACKGROUND

2. Section 274 allows a Bell Operating Company (BOC) to provide electronic publishing service disseminated by means of its basic telephone service only through a "separated affiliate" or an "electronic publishing joint venture" that meets the separation, joint marketing, and nondiscrimination requirements in that section. In the *Telemessaging and Electronic Publishing Order*, the Commission concluded that the requirement in section 274(b) that a separated affiliate or electronic publishing joint venture be "operated independently" is not a separate, substantive requirement that imposes obligations in addition to those enumerated in this section, but rather that this requirement is satisfied if a BOC and

¹ Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996 Act), *codified at* 47 U.S.C. §§ 151 *et seq.* The 1996 Act amended the Communications Act of 1934 (Communications Act).

² *Implementation of the Telecommunications Act of 1996: Telemessaging, Electronic Publishing, and Alarm Monitoring Services*, CC Docket No. 96-152, First Report and Order and Further Notice of Proposed Rulemaking, 12 FCC Rcd 5361 (1997) (*Telemessaging and Electronic Publishing Order* or *Further Notice*), *aff'd*, *BellSouth Corporation v. Federal Communications Comm'n*, 144 F.3d 58 (D.C. Cir. 1998); 47 U.S.C. §§ 260, 274.

³ *Petition for Reconsideration and Clarification of AT&T Corp.*, CC Docket No. 96-152 (filed Mar. 24, 1997) (AT&T Petition); *Petition for Reconsideration or Clarification of Pacific Telesis Group*, CC Docket No. 96-152 (filed Mar. 24, 1997) (Pacific Petition). Comments on the Petitions were filed on April 30, 1997 by Bell Atlantic, BellSouth, SBC, and Yellow Pages Publishers Ass'n (YPPA). Reply Comments were filed on May 14, 1997 by BellSouth and AT&T.

its separated affiliate or electronic publishing joint venture comply with the separation requirements set forth in subsections 274(b)(1)-(9).⁴

3. In this proceeding, AT&T asks the Commission to reconsider its decision and conclude that the "operated independently" requirement imposes additional, substantive requirements beyond those listed in subsections 272(b)(1)-(9). AT&T also asks the Commission to clarify that section 274(b)(3)(B) requires that any agreement between a BOC and a separated affiliate or joint venture for inbound telemarketing or referral services be pursuant to a written contract or a tariff that is filed with the Commission and made publicly available.⁵ Pacific asks the Commission to clarify that the restrictions on joint promotion, marketing, sales or advertising set forth in section 274(c)(1)(A) and (B) do not apply to activities between a BOC and an entity owned or controlled by a BOC if the services are disseminated through an unaffiliated carrier's basic telephone service, and no separated affiliate or other BOC affiliate is involved."⁶

4. In this Order on Reconsideration:

- we decline AT&T's request to reconsider the Commission's conclusion that the "operated independently" provision in section 274(b) is not a separate, substantive requirement;
- we clarify, as requested by AT&T, that section 274(b)(3)(B) requires any agreement between a BOC and a separated affiliate or electronic publishing joint venture for inbound telemarketing or referral services be pursuant to a written contract or a tariff that is filed with the Commission and made publicly available; and
- we clarify, as requested by Pacific, that the restrictions on joint promotion, marketing, sales, or advertising set forth in sections 274(c)(1)(A) and (B) do not apply to activities between a BOC and an entity owned or controlled by a BOC if the electronic publishing services are disseminated through an unaffiliated carrier's basic telephone service, and no separated affiliate or other BOC affiliate is involved in such promotion, marketing, sales, and advertising.

⁴ AT&T Petition at 2 (citing *Telemessaging and Electronic Publishing Order*, 12 FCC Rcd at 5389-90, ¶¶ 62-65). Section 274(b) refers to "separated" affiliates whereas Section 272(a)(2) refers to "separate" affiliates. Consistent with the statutory language in section 274(b), we refer to "separated" affiliates throughout this Order to refer to BOC affiliates engaged in electronic publishing.

⁵ AT&T Petition at 8 (citing *Telemessaging and Electronic Publishing Order*, 12 FCC Rcd at 5424, ¶ 150); see 47 U.S.C. § 274(b)(3)(C) (stating that a separated affiliate or joint venture and the BOC with which it is affiliated shall carry out transactions "in a manner that is auditable in accordance with generally accepted auditing standards").

⁶ Pacific Petition at 2-5 (citing *Telemessaging and Electronic Publishing Order*, 12 FCC Rcd at 5384-85, 5411-12, 5418-19, ¶¶ 54, 120, 136, 137, 139).

III. ORDER ON RECONSIDERATION

A. The "Operated Independently" Requirement of Section 274(b)

a. Background

5. Section 274(b) of the 1996 Act provides that "[a] separated affiliate or electronic publishing joint venture shall be operated independently from the [BOC]."⁷ In the *Telemessaging and Electronic Publishing Order*, the Commission concluded that the "operated independently" requirement of section 274(b) obligates a separated affiliate to comply with the requirements of subsections 274(b)(1)-(9), and an electronic publishing joint venture to comply with subsections 274(b)(1)-(4), (6), (8)-(9).⁸ Moreover, the Commission found that the phrase "operated independently" is not a separate substantive restriction, but rather that section 274(b) is satisfied if a BOC and its separated affiliate or electronic publishing joint venture comply with the applicable restrictions of subsections 274(b)(1)-(9).

6. The Commission also found that its interpretation of the "operated independently" requirement of section 274(b) is consistent with its interpretation of the "operate independently" provision in section 272(b).⁹ In the *Non-Accounting Safeguards Order*, the Commission determined that the "operate independently" provision of section 272(b) imposes requirements beyond those set forth in subsections 272(b)(2)-(5).¹⁰ The Commission explained that section 272(b) imposes five structural and transactional requirements governing the relationship between a BOC and a section 272 affiliate, only one of which is that the affiliate "shall operate independently from the [BOC]."¹¹ In the *Telemessaging and Electronic Publishing Order*, in contrast, the Commission found that the "operated independently" requirement in section 274(b) is followed by nine substantive restrictions, which it read as the criteria that must be satisfied to ensure operational independence under this section.¹²

⁷ 47 U.S.C. § 274(b).

⁸ *Telemessaging and Electronic Publishing Order*, 12 FCC Rcd at 5389, ¶ 62. The Commission reached this conclusion because subsections 274(b)(5) and 274(b)(7) specifically refer to separated affiliates and not to electronic publishing joint ventures. *Id.* at 5389 ¶¶ 62-63.

⁹ *Id.*, 12 FCC Rcd at 5389-90, ¶ 65.

¹⁰ *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, CC Docket No. 96-149, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21905, 21981, ¶ 156 (*Non-Accounting Safeguards Order*) (1996), *recon pending*, subsequent citations omitted.

¹¹ *Non-Accounting Safeguards Order*, 11 FCC Rcd at 21981, ¶ 157.

¹² *Telemessaging and Electronic Publishing Order*, 12 FCC Rcd at 5389-90, ¶ 65.

b. Discussion

7. We decline, at this time, to reinterpret the phrase "operated independently" to impose additional, separate substantive requirements, absent any indication that the requirements listed in section 274(b)(1)-(9) are inadequate to assure that a BOC and its separated affiliate or electronic publishing joint venture operate independently. Subsections (1)-(9) impose specific requirements to assure operational independence, including, among other things, a requirement to maintain separate books and accounts, a limitation on debt assumption, a requirement to carry out transactions independently, and a restriction on common ownership of property.¹³

8. AT&T contends that the Commission was incorrect in concluding that, although section 272(b)(1) imposes requirements beyond those listed in sections 272(b)(2)-(5), section 274(b) does not impose requirements beyond those listed in section 274(b)(1)-(9).¹⁴ AT&T argues that the Commission's decision to give the phrase "operate independently" substantive effect in the context of section 272, but not "operated independently" in the context of section 274, conflicts with the normal rule of statutory construction that "identical" words used in different parts of the same act are intended to have the same meaning.¹⁵

9. Section 272(b) sets forth the structural and transactional requirements for the separate affiliates BOCs must establish to provide, among other things, interLATA telecommunications and information services pursuant to section 272(a).¹⁶ Although section 274(b) contains similar language to section 272(b)(1), section 274(b) mandates that a separated affiliate or electronic publishing joint venture must be "operated independently" and then lists nine specific requirements governing the relationship between a BOC and a separated affiliate or joint venture. In contrast, section 272(b) imposes five statutory requirements governing the relationship between a BOC and a section 272 affiliate, only one of which is that the affiliate shall "operate independently" from the BOC. Between the *Non-Accounting Safeguards Order* and the *Telemessaging and Electronic Publishing Order*, the Commission provided sufficient explanation for its conclusion that the "operated independently" requirement of section 274(b) imposes different requirements than the "operate independently" provision of section 272(b).¹⁷

¹³ 47 U.S.C. §§ 274(b)(1)-(9).

¹⁴ AT&T Petition at 2-3.

¹⁵ *Id.* at 4-5 (citations omitted).

¹⁶ 47 U.S.C. §§ 272(a), (b).

¹⁷ See *Non-Accounting Safeguards Order*, 11 FCC Rcd at 21977, 21981 ¶¶ 148, 156; *Telemessaging and Electronic Publishing Order*, 12 FCC Rcd at 5389-90, ¶¶ 64-65.

10. AT&T argues, in essence, that the two phrases "operate independently" and "operated independently" in the two sections are identical and therefore must be interpreted identically. We disagree. As the Commission has previously concluded, sections 272(b) and 274(b) are organized and structured differently and address different subject matters.¹⁸ Accordingly, we find that the terms "operate independently" in section 272(b)(1) and "operated independently" in section 274(b) do not have to be interpreted to impose the same obligations on the BOCs.

11. AT&T also asserts that the Commission failed to provide an adequate reason for changing its long-standing interpretation of the phrase "operate independently" in other contexts.¹⁹ Although it is correct that the Commission, on its own authority, previously imposed requirements of operational independence in the context of *Computer II* and the cellular separation rules,²⁰ in the *Telemessaging and Electronic Publishing Order* the Commission was interpreting a new statute, with new requirements, enacted by Congress. It was not adopting, on its own authority, a new standard for operational independence that contradicted earlier decisions.²¹ Accordingly, there is no need to distinguish the Commission's prior precedents or to impose the same requirements adopted prior to enactment of the 1996 Act.

B. Inbound Telemarketing or Referral Services

a. Background

12. In the *Telemessaging and Electronic Publishing Order*, the Commission held that "[a] BOC may choose to provide inbound telemarketing or referral services either

¹⁸ *Accord* SBC at 2-3; YPPA at 2; BellSouth at 2.

¹⁹ AT&T Petition at 6-7. In the *Non-Accounting Safeguards* proceeding, AT&T, among others, argued that the "operate independently" requirement in section 272(b)(1) must be read to impose, at a minimum, the structural separation rules established in the *Computer II* proceeding. *Non-Accounting Safeguards Order*, 11 FCC Rcd at 21979, ¶ 154; *Amendment of Section 64.702 of the Commission's Rules and Regulations (Computer II)*, 77 FCC 2d 384 (1980) (*Computer II Final Order*), subsequent citations omitted. AT&T has raised similar arguments here. Under *Computer II*, a BOC's enhanced services subsidiary was required to have its own operating, marketing, installation and maintenance personnel for the services and equipment it offered, to comply with network information disclosure requirements, and to maintain its own books of account. *Computer II Final Order*, 77 FCC 2d at 476-77, 480-81, ¶¶ 236, 238-39, 245-49. The regulated entity and its enhanced services subsidiary were prohibited, among other things, from using in common any leased or owned physical space or property on which transmission equipment or facilities used in basic transmission services were located, and from sharing computer capacity. *Id.* at 477-80, ¶¶ 240, 241-44. The enhanced services subsidiary also was barred from constructing, owning, or operating its own transmission facilities, and was therefore required to obtain such facilities from a local exchange carrier pursuant to tariff. *Id.* at 474, ¶ 229.

²⁰ AT&T Petition at 6-7 (citing 47 C.F.R. § 64.702(c) (*Computer II* separation rules for BOC provision of enhanced services) and 47 U.S.C. § 22.903 (cellular separation rules)).

²¹ *Accord* SBC Opposition at 5-6 & n.17; YPPA Opposition at 3; BellSouth at 4; BellSouth Reply at 3.

pursuant to a contractual arrangement or *during the normal course of its inbound telemarketing operations*."²² The Commission stated that to the extent "a BOC chooses either or both of these approaches" in providing inbound telemarketing or referral services, the nondiscrimination provisions of section 274(c)(2)(A) require that such services be made available to unaffiliated electronic publishers using the same approach, *i.e.*, pursuant to a contractual arrangement or during the normal course of its inbound telemarketing operations.²³

13. AT&T asks the Commission to clarify that section 274(b)(3)(B) requires any agreement between a BOC and its section 274 affiliate or joint venture partner for inbound telemarketing or referral services to be pursuant to a written contract or a tariff that is filed with the Commission and made publicly available.²⁴ Section 274(b)(3)(B) provides that a separated affiliate or joint venture and the BOC with which it is affiliated shall "carry out transactions . . . (B) pursuant to written contracts or tariffs that are filed with the Commission and made publicly available."²⁵ No party opposes AT&T's request for clarification.

b. Discussion

14. We agree with AT&T that we should clarify the Commission's discussion in paragraph 150 of the *Telemessaging and Electronic Publishing Order*. In that paragraph, the Commission noted that a BOC may "choose to provide inbound telemarketing or referral services either pursuant to a contractual arrangement or during the normal course of its inbound telemarketing operations." We clarify in this Order that any such agreement between a BOC and its section 274 affiliate or joint venture partner relating to an inbound telemarketing or referral service, whether it be pursuant to contract or through the "normal course" of business, constitutes a "transaction" for purposes of section 274(b)(3)(B). Accordingly, we conclude that any agreement whereby a BOC agrees to provide inbound telemarketing or referral services must be pursuant to a written contract or tariff that is filed with the Commission and made publicly available. We find that the requirements of section 274(b)(3)(B), by requiring all "transactions" to be publicly disclosed and auditable in accordance with generally accepted auditing standards, will help ensure that BOCs are complying with the nondiscrimination and accounting safeguards of the 1996 Act.

²² *Telemessaging and Electronic Publishing Order*, 12 FCC Rcd at 5424, ¶ 150 (emphasis added). The term "inbound telemarketing" is defined as the "marketing of property, goods, or services by telephone to a customer or potential customer who initiated the call." 47 U.S.C. § 274(i)(7).

²³ *Telemessaging and Electronic Publishing Order*, 12 FCC Rcd at 5424, ¶ 150 (citing 47 U.S.C. § 274(c)(2)(A)).

²⁴ AT&T Petition at 8 (citing *Telemessaging and Electronic Publishing Order*, 12 FCC Rcd at 5424, ¶ 150).

²⁵ 47 U.S.C. § 274(b)(3)(B).

C. Dissemination by Means of an Unaffiliated Carrier's Basic Telephone Service

a. Background

15. In the *Telemessaging and Electronic Publishing Order*, the Commission held that, pursuant to the terms of section 274, in order for a BOC to be engaged in the provision of electronic publishing and subject to section 274, electronic publishing must be disseminated by means of the BOC's basic telephone service, and the BOC must have control of, or a financial interest in, the content of the information being provided.²⁶ In reading section 274(a) together with the definition of "basic telephone service" in section 274(i)(2), the Commission concluded that, if a BOC or BOC affiliate disseminates electronic publishing services through the basic telephone service of a competing wireline local exchange carrier or commercial mobile radio service provider, a separated affiliate or electronic publishing joint venture is not required.²⁷

16. The Commission also noted that sections 274(c)(1)(A) and (B) generally prohibit a BOC from carrying out any promotion, marketing, sales, or advertising activities with a separated affiliate or an affiliate if, in the latter case, such activities "relate to" the provision of electronic publishing.²⁸ Thus, the Commission held that a BOC affiliate that does not provide electronic publishing services itself, but rather provides services that "relate to" the provision of electronic publishing, is precluded from carrying out marketing and sales-related activities for or in conjunction with the BOC.²⁹

b. Discussion

17. Pacific asks the Commission to clarify that the restrictions on joint promotion, marketing, sales, or advertising set forth in sections 274(c)(1)(A) and (B) do not apply if the electronic publishing services are disseminated through an unaffiliated carrier's basic telephone service and no separated affiliate or other BOC affiliate is involved in the

²⁶ *Telemessaging and Electronic Publishing Order*, 12 FCC Rcd at 5386, ¶ 56.

²⁷ *Id.*, 12 FCC Rcd at 5384-85, ¶ 54 & n.132. Section 274(i)(2) defines the term "basic telephone service" to mean "any wireline telephone exchange service, or wireline telephone exchange service facility, provided by a [BOC] in a telephone exchange area, except that such term does not include (A) a competitive wireline telephone exchange service provided in a telephone exchange area where another entity provides a wireline telephone exchange service that was provided on January 1, 1984, or (B) a commercial mobile service." 47 U.S.C. § 274(i)(2).

²⁸ *Id.*, 12 FCC Rcd at 5386, 5411-12, ¶¶ 57, 120; 47 U.S.C. § 274(c)(1)(A) and (B).

²⁹ *Id.*, 12 FCC Rcd at 5411-12, ¶¶ 120-22.

dissemination.³⁰ No party opposes Pacific's petition. We agree that such clarification is appropriate.

18. Section 274(i)(10) defines a BOC to include an entity or corporation owned or controlled by the BOC (other than an electronic publishing joint venture owned by such an entity or corporation).³¹ Consistent with the Commission's finding in the *Telemessaging and Electronic Publishing Order*, we find that an entity or corporation owned or controlled by a BOC pursuant to section 274(i)(10) may promote, market, sell, or advertise electronic publishing services, and engage in promotion, marketing, sales, and advertising related to electronic publishing, if: (1) the electronic publishing service is disseminated by means of the basic telephone service of a competing wireline local exchange carrier or commercial mobile radio service (CMRS) provider; and (2) no separated affiliate or other BOC affiliate is involved in such promotion, marketing, sales, and advertising.

19. As noted in the *Telemessaging and Electronic Publishing Order*, the dissemination of electronic publishing services through the basic telephone service of competing, unaffiliated providers significantly reduces the ability of a BOC (including an entity or corporation owned or controlled by the BOC) to engage in anticompetitive behavior.³² Accordingly, as the Commission held in the underlying order, to the extent a BOC (including an entity or corporation owned or controlled by the BOC) disseminates electronic publishing services through the facilities of a competing wireline local exchange carrier or CMRS provider, and thus not via its own basic telephone services, it is not required to provide such services through a separated affiliate or electronic publishing joint venture.³³ We clarify that, in this situation, the joint marketing restriction in section 274(c)(1)(A), which prohibits a BOC from carrying out "promotion, marketing, sales, or advertising for or in a conjunction with a separated affiliate," would not apply. Similarly, we conclude that, in such a situation, the joint marketing restriction in section 274(c)(1)(B) would not apply unless the BOC is carrying out "promotion, marketing, sales, or advertising for or in conjunction with an affiliate that is related to the provision of electronic publishing."³⁴ Given that Pacific's petition does not present the Commission with a specific factual situation, we do not opine on what type of services may be "related to" the provision of electronic publishing.

³⁰ Pacific Petition at 2-5 (citing *Electronic Publishing and Telemessaging Order* at 5384-85, 5411-12, 5418-19, ¶¶ 54, 120, 136-37, 139).

³¹ 47 U.S.C. § 274(i)(10).

³² *Telemessaging and Electronic Publishing Order*, 12 FCC Rcd at 5384-85, ¶ 54.

³³ *Id.*

³⁴ *Id.*, 12 FCC Rcd at 5386, ¶57 (noting that section 274(c)(1)(B) contemplates situations in which a BOC affiliate is involved in the provision of services that are "related to" the provision of electronic publishing, but does not provide electronic publishing services disseminated by means of the BOC or its affiliate's basic telephone service).

IV. THIRD REPORT & ORDER

20. On the same day the Commission issued the *Electronic Publishing Order*, the Commission released a *Further Notice of Proposed Rulemaking (Further Notice)* that sought comment on the meaning of "control" and "financial interest" for the purpose of determining what constitutes BOC provision of electronic publishing services under section 274.³⁵ The *Further Notice* also sought comment on how the Commission should resolve certain ambiguities in section 274(b)(3)(B), which requires that BOCs and their separated affiliates or electronic publishing joint ventures "carry out transactions pursuant to written contracts or tariffs that are filed with the Commission and made publicly available."³⁶

A. Definition of "Control" and "Financial Interest"

a. Background

21. We concluded in the *Telemessaging and Electronic Publishing Order* that a BOC engaged in the provision of electronic publishing is subject to section 274 only to the extent that it controls, or has a financial interest in, the content of the information being disseminated over its basic telephone services.³⁷ We sought further comment in the *Further Notice* on the meaning of "control" and "financial interest" in the context of section 274.³⁸

22. In the *Further Notice*, we tentatively concluded that section 274(i)(4)'s definition of control, *i.e.*, the "possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise," is inappropriate for determining the meaning of "control" in the present context, *i.e.*, when a BOC has "control of the content of information transmitted via its basic telephone service." In addition, the Commission also tentatively concluded that a BOC has a "financial interest" in the content of the information when the BOC owns the information or has a direct or indirect equity interest in the information being disseminated via its basic telephone services.³⁹ The Commission sought comment on other forms of BOC participation that should be considered indicia of "financial interest."⁴⁰

³⁵ *Implementation of the Telecommunications Act of 1996: Telemessaging, Electronic Publishing, and Alarm Monitoring Services*, CC Docket No. 96-152, First Report and Order and Further Notice of Proposed Rulemaking, 12 FCC Rcd 5361 (1997), (*Further Notice*), *aff'd*, *BellSouth Corporation v. Federal Communications Comm'n*, 144 F.3d 58 (D.C. Cir. 1998); 47 U.S.C. §§ 260, 274.

³⁶ *Further Notice* at ¶ 242, 243, 248-250.

³⁷ *Telemessaging and Electronic Publishing Order*, 12 FCC Rcd at 5382-83, ¶ 49.

³⁸ *Id.*, 12 FCC Rcd at 5461, ¶ 242.

³⁹ *Id.*, 12 FCC Rcd at 5461a, ¶ 245.

⁴⁰ *Id.*

23. The commenters expressed various opinions on how "control" should be defined in the present context. Some commenters believe that control should be defined as (i) a ten percent or more equity interest in the entity that publishes the content,⁴¹ or an equity or revenue interest of more than 50 percent in an electronic publishing service that is disseminated by the BOC's basic telephone service;⁴² (ii) the ownership of the content of the information, *i.e.*, the intellectual property in the information, such as the copyright holder;⁴³ or (iii) the "act" of publishing, including: originating, authoring, compiling, collecting, or editing the information content;⁴⁴ or similarly, the exercise of editorial discretion to determine the fundamental package of information that will be presented to a user.⁴⁵ Alternatively, AT&T proposes that the Commission not adopt a particular standard at this time, but instead perform a "highly fact-specific analysis" on a "case-by-case basis" to establish whether a BOC has control of the content of information.⁴⁶

24. Ameritech and U S WEST generally agree with the Commission's tentative conclusion on the meaning of financial interest.⁴⁷ With some variation, most of the commenters were in general agreement with a "more than 10 percent" threshold for defining "financial interest."⁴⁸ The commenters differed, however, regarding the entity or subject to which the threshold should apply. Some commenters believed that the threshold should apply to: (i) the entity that owns the information;⁴⁹ (ii) a legally protected property interest or intellectual property rights in the content of the information;⁵⁰ (iii) the right to the gross

⁴¹ Bell Atlantic at 3.

⁴² U S WEST at 6.

⁴³ Ameritech at 2.

⁴⁴ U S WEST at 6.

⁴⁵ BellSouth at 3.

⁴⁶ AT&T Reply at 2.

⁴⁷ Ameritech at 3. U S WEST agrees with the Commission's tentative conclusion, subject to the caveat that the financial interest must be in an entity that has originated, authored, compiled, collected, or edited the information content. U S WEST at 9.

⁴⁸ Ameritech at 3; Bell Atlantic at 4; U S WEST at 10.

⁴⁹ Bell Atlantic at 4.

⁵⁰ Ameritech at 2; SBC at 7.

revenues of the entity that publishes the content;⁵¹ or (iv) the equity or revenue interest in the electronic publisher.⁵²

25. AT&T argues that the standards proposed by the BOC commenters would not effectively prevent the BOCs from obtaining an impermissible "financial interest" in information transmitted via their gateways. AT&T maintains, therefore, that the Commission, in determining "financial interest," should utilize a "fact-specific analysis" performed on a "case-by-case basis," as necessary.⁵³

b. Discussion

26. We decline to adopt rules further defining "control" or "financial interest" for purposes of section 274 for two reasons. First, the Commission has not, to date, received any complaints alleging a violation of section 274. Thus, there has been no showing that the Commission's current rules are inadequate to ensure that the objectives of section 274 are being fulfilled. Second, any rules we implemented would expire on February 8, 2000 when the requirements of section 274 automatically sunset. In the event any disputes arise before the sunset date regarding whether a BOC is actually engaged in the provision of electronic publishing, they may be resolved on a case-by-case basis through a section 208 complaint process. Given the availability of this complaint process and the limited duration any rules would have, therefore we find that the public interest would not be served by adopting further rules to implement this section.

⁵¹ Bell Atlantic at 4.

⁵² U S WEST at 10; BellSouth at 4-5.

⁵³ AT&T at 4; AT&T Reply at 7. AT&T states that the Commission's rules should be flexible enough to "encompass arrangements by which the BOCs may seek to evade [section] 274(c)(1)'s restrictions on joint marketing, subsidize non-regulated businesses, or engage in other anticompetitive activities which [section] 274 is expressly intended to prohibit." AT&T Reply at 7. For example, AT&T states that a BOC could structure commission payments, licensing agreements, or other arrangements so as to avoid taking an "intellectual property right," while still intertwining its interests with those of information providers using its gateway. *Id.* at 8. AT&T also notes that, in the *Implementation of the Telecommunications Act of 1996: Telemessaging, Electronic Publishing, and Alarm Monitoring Services*, 12 FCC Rcd 3824 (1997) (*Alarm Monitoring Order*), *recon. pending*, the Commission stated its intention to "examine sales agency and marketing arrangements between a BOC and an alarm monitoring company on a case-by-case basis to determine whether they constitute the 'provision' of alarm monitoring service." AT&T Reply at 6-7 (quoting *Alarm Monitoring Order*, 12 FCC Rcd at 3841, ¶ 38).

B. Meaning of "Transaction" in Section 274(b)(3)**a. Background**

27. In the *Further Notice*, the Commission sought comment on what constitutes a "transaction" for purposes of section 274(b)(3).⁵⁴ The Commission noted that, in the *Accounting Safeguards Order*, the Commission concluded that for purposes of a similar public disclosure requirement in section 272(b)(5),⁵⁵ the BOC and its affiliate must have agreed upon the terms and conditions for telephone exchange and exchange access for the agreement to constitute a "transaction."⁵⁶

28. The commenters agreed that the definition of "transaction" should parallel the Commission's definition for "transaction" adopted in connection with section 272(b)(5).⁵⁷ As noted above, AT&T asked the Commission to clarify that section 274(b)(3)(B) requires any agreement between a BOC and its section 274 affiliate or joint venture partner for inbound telemarketing or referral services to be pursuant to a written contract or tariff that is filed with the Commission and made publicly available.

b. Discussion

29. We decline to adopt further rules implementing section 274(b)(3)(B) for the same two reasons stated above.⁵⁸ Moreover, we note that our conclusion in the *Order on Reconsideration* clarifies that section 274(b)(3)(B) requires any agreement whereby a BOC agrees to provide inbound telemarketing or referral services must be pursuant to a written contract or tariff that is filed with the Commission and made publicly available.⁵⁹ Accordingly, any such agreement either through a written contract or "normal course of business" constitutes a "transaction" for purposes of section 274(b)(3)(B).

⁵⁴ Section 274(b)(3) provides that "[a] separated affiliate or joint venture and the Bell operating company with which it is affiliated shall . . . (3) carry out transactions (A) in a manner consistent with such independence, (B) pursuant to written contracts or tariffs that are filed with the Commission and made publicly available, and (C) in a manner that is auditable in accordance with generally accepted auditing standards." 47 U.S.C. § 274(b)(3).

⁵⁵ Section 272(b)(5) provides that "[t]he separate affiliate required by this section . . . (5) shall conduct all transactions with the Bell operating company of which it is an affiliate on an arm's length basis with any such transactions reduced to writing and available for public inspection." 47 U.S.C. § 272(b)(5).

⁵⁶ See *Implementation of the Telecommunications Act of 1996: Accounting Safeguards under the Telecommunications Act of 1996*, 11 FCC Rcd 17539, 17594, ¶ 124 (1996) (*Accounting Safeguards Order*).

⁵⁷ Bell Atlantic at 4; SBC at 8; AT&T at 8; U S WEST at 14.

⁵⁸ See ¶ 26 *infra*.

⁵⁹ See ¶ 13 *infra*.

V. FINAL REGULATORY FLEXIBILITY CERTIFICATION

30. *Supplemental Final Regulatory Flexibility Certification.* In the *Telemessaging and Electronic Publishing Order*, the Commission concluded that the rules adopted in that Order pertain to only BOCs which do not qualify as small entities under the Regulatory Flexibility Act (RFA), as amended by the Contract With America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996).⁶⁰ The Commission therefore certified that the rules adopted in that order would not have a significant impact on a substantial number of small entities, as required by the RFA. The clarifications we adopt in the *Order on Reconsideration and Third Report & Order* do not affect our certification in the *Telemessaging and Electronic Publishing Order*.

31. The Commission's Office of Public Affairs shall send a copy of this *Order on Reconsideration*, including this certification, in a report to Congress pursuant to the SBREFA, 5 U.S.C. § 801(a)(1)(A). A copy of this certification will also be provided to the Chief Counsel for Advocacy of the Small Business Administration, and will be published in the Federal Register.⁶¹

VI. FINAL PAPERWORK REDUCTION ANALYSIS

32. As required by the Paperwork Reduction Act of 1995, Pub. L. No. 104-13,⁶² the *Further Notice of Proposed Rulemaking* invited the general public and the OMB to comment on proposed changes to the Commission's information collection requirements contained in the *Further Notice of Proposed Rulemaking*.⁶³ The collections of information were approved by OMB under OMB control number 3060-0762. No comments were submitted in response to the Commission's request for comment on the information collections contained in the *Further Notice of Proposed Rulemaking*. In this *Third Report and Order*, we have decided to adopt all of the information collection requirements proposed in the *Further Notice of Proposed Rulemaking*. There are no changes to our information collection requirements proposed in the *Further Notice of Proposed Rulemaking*.

VII. ORDERING CLAUSES

33. Accordingly, IT IS ORDERED that, pursuant to Sections 1, 2, 4, 201-202, 274, and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152, 154,

⁶⁰ *Telemessaging and Electronic Publishing Order*, 12 FCC Rcd at 5457-60, ¶¶ 229-38.

⁶¹ 5 U.S.C. § 605(b).

⁶² 44 U.S.C. §§ 3501 *et. seq.*

⁶³ *Telemessaging and Electronic Publishing Order*, 12 FCC Rcd at 5465, ¶ 254.

201-202, 274, and 303(r), the ORDER ON RECONSIDERATION and THIRD REPORT AND ORDER in CC Docket No. 96-152 IS ADOPTED.

34. IT IS FURTHER ORDERED that the Petition for Reconsideration filed by AT&T Corporation IS GRANTED to the extent described herein and IS DENIED in all other respects and the Petition for Reconsideration filed by Pacific Telesis Group IS GRANTED to the extent described herein.

35. IT IS FURTHER ORDERED that the policies, rules, and requirements set forth in this ORDER ON RECONSIDERATION and THIRD REPORT AND ORDER are effective thirty days after publication in the Federal Register.

36. IT IS FURTHER ORDERED that the Commission's Office of Public Affairs, Reference Operations Division, SHALL SEND a copy of this ORDER ON RECONSIDERATION and THIRD REPORT AND ORDER, including the Supplemental Final Regulatory Flexibility Certification, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION



Magalie Roman Salas
Secretary